THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

MISCELLANEOUS APPLICATION No. 285 OF 2003

(ARISING FROM CIVIL SUIT No. 687 OF 2002)

KEBIRUNGI JUSTINE :: PLAINTIFF

-VERSUS-

1) M/S ROAD TAINERS LTD }
2) M/S SPEDAD (U) LTD }:::::::::::::::::::::::::: DEFENDANTS
3) WANYOIKE THENGE NJUNGUNA }

R U L I N G:-

The plaintiff filed an application under Order 6 rule 18 for an order to amend a plaint. When the application was set for hearing Mr Kihika who appeared for the Respondent assisted by Mr Ssekatawa raised a preliminary objection contending among other things that the plaint was bad in law for the reason that it did not give particulars of negligence as required by law. For that reason the Learned Counsel contended that the plaint did not disclose a cause of action and as such, it could not be amended. The Learned Counsel relied on the case of Mukasa Vs Singh & Others [1969] EA 442. The Learned Counsel submitted further that even the intended amendment could not cure the defect as it did not also have particulars of negligence. Instead it sought to introduce another cause of action based no res ipsa loquitor.

Mr Ssekatawa supported the objection and contended further that even the affidavit in support of the application to amend the plaint was incurably defective for offending the provision of rule 8 of the first schedule to commissioners for Oath (Advocates) Act Cap. 53 Laws of Uganda. The Learned Counsel accordingly submitted that there was no application to amend a nullity.

Mr Alex Bashasha who appeared for the Applicant opposed the preliminary objection and contended that the question of particulars was a were technicality in law. The Learned Counsel referred me to a litany of cases which were not relevant to the issue in

contention. They would be relevant in the substantive application for amendment of pleading: the cases are: Stewart Vs. Metropolitan Tramways Co [1886] 16 QBD 556, 558 and Coopers Vs. Smith [1884] Ch D 711.

On the second leg of the preliminary objection relating to rule 8 of the First Schedule to Commissioner for Oaths (Advocates) Act Cap 53, the Learned Counsel relied on the case of Uganda Corp. Creamaries Ltd & Another Vs Reamoton Ltd. Civil Application No. 44 of 1998 (unreported) where Engwau JA held that substantive justice should be administered without undue regard to technicalities. He concluded that to allow the objection would be unjust as it would tantamount to shutting out the litigant.

I will deal with the second leg of the preliminary objection first. In the case of Uganda Corp. Creamaries Ltd & Another Vs Reamoton Ltd. (supra), there was a preliminary objection that the original and supplementary affidavits supporting the Notice of Motion were incurably defective for offending rule 8 of the First Schedule to Commissioner for Oaths (Advocates) Act Cap 53 Laws of Uganda for the reason that the exhibits to those affidavits were not sealed and marked with serial letter of identification. Engwau, JA held as follows:-

> "In my view, whether or not those annextures have been securely sealed with the seal of the advocate who commissioned the affidavits thereof, does not offend Rule 8 because they were not exhibits produced and exhibited to a Court during a trial or hearing in proof of facts. In any case, the annextures in the present case were not in dispute. Even if those annextures were detached, the affidavits thereof would still be competent to support the Notice of Motion. Rule 8, though mandatory, is procedural and does not go to the root as to competence of affidavits. In the premises, substantive justice should be administered without undue regard to technicalities".

In light of the above authority, the second leg of the preliminary objection collapses. Rule 8 in merely procedural and does not go to the root as to the competence of affidavits.

I move to the first leg where Counsel contended that the plaint does not disclose particulars of negligence. The offending paragraphs are paragraphs 7,8 and 9 which are as follows:-

> "7 On the 9th October 2001 the above mentioned motor vehicle semi-trailer being negligently driven by the 3rd Defendant knocked the Plaintiff's vehicle corona 452 UDS at Jinja Road round about at Jinja Road and caused extensive damage to the Plaintiff's car. The driver who was obviously at fault was convicted at Buganda Road Court and fine (Sic) on 12/10/2001 under Criminal Case No. UNPT 1871/2001.
> 8. The damage caused by the driver's negligence for which the registered owners and their agents are vicariously liable cost the Plaintiff's Ug. Shs.5,054,700/= in repairs of the car.
> 9. The Plaintiff shall contend that the said accident was caused by the gross negligence of the 3rd Defendant in the course of his employment with the 1st and 2nd Defendants.
>
> Particulars of Negligence:-
>
> (a) Driving recklessly without due regard to other road users.

The relevant paragraphs in the proposed amendment are paragraphs 9 and 10:-

> "9. The Plaintiff will aver that the Defendants have absolutely no defence to the suit and reliance will at the trial be placed on the principle of res ipsa loquitor but without prejudice to averments contained in paragraphs 6,7,8 and 10.
> 10. The Plaintiff will aver that the accident was caused solely by

the negligence of the 2nd Defendant who drove motor vehicle No. KAH 056G/2B/3819/M/BENZ recklessly without due regard to other road users. As a result of the accident the Plaintiff suffered loss and damages for which she hold the Defendant liable".

What amounts to particulars of negligence was clearly stated in the case of Mukasa Vs. Singh and others [1969] EA 422 where Sheridan, Ag. C.J (as he then was) held that particulars of negligence must be pleaded and that even in a suit where the doctrine of res ipsa loquitor is going to be invoked it is still necessary to plead particulars of negligence. The Learned Judge had this to say:-

> "It is not enough to plead the mere fact of an accident between three motor vehicles on the highway. Nor do the bare words "drove their respective vehicles so negligently that they collided and as a result of the accident Mary Namakula died from injuries she sustained in the accident" in paragraph 4 save the plaint.
>
> The doctrine of res ipsa loquitor is concerned with the onus of proof and is not a substitute of negligence ……. The Plaintiff must first plead the particulars of negligence on which he relies, and which will be binding on him, before he can shift the onus of disproving negligence onto the Applicant.".

From the above quotation I do agree with Counsel for the Defendant that the mere words "driving recklessly without due regard to other road users" do not amount to particulars of negligence. Those are bare words which only point to the fact of an accident. The Plaintiff should have gone ahead to state particulars of negligence proposed in Atkin's Court Forms and Precedents (relied upon by the Learned Judge) as follows:-

> **"Particulars of negligence:-**
>
> The Defendant was negligent in that he –

(i) threw the said, (sack) on to the said highway with knowledge or means of knowledge that it might cause injury to people thereon;

(ii) with knowledge or means of knowledge as aforesaid caused or permitted the said (sack) to fall upon the said highway;

(iii) failed to keep away or any proper lookout or to have regard for persons using the said highway".

Even the proposed amendment does not cure the above defect as it is still devoid of particulars of negligence. Instead the Plaintiff sought to rely on the doctrine of res ipsa loquitor. According to the case of Mukasa Vs Singh & Others (supra), the doctrine of res ipsa loquitor is not a substitute for proof of negligence. The Plaintiff must first plead particulars of negligence on which he relies before he can shift the onus of disproving negligence on to the Defendant by pleading res ipsa loquitor.

In a sheer desperation the Learned Counsel for the Plaintiff contended that the need for particulars of negligence was a mere technically in law. I don't agree with that proposition. I find support in the case of H.J. Stanley & Sons Ltd Vs. Akberali Saleh [1963] EA 574 where Spry J held as follows:-

> "It is always distasteful to decide any issue on technical grounds rather than substantial merit, but that rules of pleading have been evolved in general interest so that all parties may know the allegations they have to meet and that issues may be framed and justice done without undue delay" Emphasis added.

In light of the above authority, I find that giving particulars of negligence is not a mere technicality but a substantial merit as it is from it that the Defendant is able to know the allegations to meet and the type of defence to prepare. The sum total of the above is that the Court will find it easy to frame issues and determine the suit without undue delay.

For the above reason I find that the plaint (both original and the amendment) does not disclose any cause of action. The same is accordingly struck out with costs. The Plaintiff can go back to the drawing board if she so wishes.

RUBBY AWERI-OPIO

J U D G E

1/9/2003.

1/9/2003:-

Bashasha for the Plaintiff.

Kihika for the Defendant.

Ruling heard in Chambers as in open Court.

RUBBY AWERI-OPIO

J U D G E

1/9/2003.